SUPREME COURT, U. S.

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No. 887

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF

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Respondent suggests that petitioner seeks a review by this Court of fact findings made by the district court (Resp. Brief, p. 5). That is not the case. As the court of appeals noted, substantially all of the facts were stipulated. No issue of fact is raised by the petition and respondent does not dispute the statement of facts set forth in the petition.

The petition presents a question of law of great importance in the regulation of railroads, *i.e.*, whether section 1(18) which prohibits extension of railroad operations unless authorized by the Interstate Commerce Commission is inapplicable unless there is an expenditure of railroad funds for construction or use of the tracks over which the extended operations are conducted to invade territory served by another railroad. The result of the ruling below is to excuse railroads from the requirement that extended operations may not be conducted without commission permission

and is virtually a license for the undisciplined raiding of traffic contrary to the purpose of the statute as set forth by this Court in *Texas & Pac. Ry.* v. *Gulf, Colo. & S. F. Ry.*, 270 U.S. 266 (1926).

Respondent incorrectly states that petitioner misconceives the ground of the decision below (*Id.* at 9-10). Respondent correctly sets forth the rule of law applied below, stating that the court:

> " . . . concluded that where it operates over a private track owned by a shipper a carrier does not undertake an activity covered by Section 1(18) unless (1) it maintains a common carrier service, *i.e.*, serves the public generally, over such track or (2) it pays for the use or maintenance of the track." (*Id.* at 3-4)

Petitioner stated that neither of the alternate requirements of that ruling were met[1] but asserts that by its ruling, the district court erroneously held that expenditure of carrier funds for construction or use of tracks to serve one shipper is a threshold requirement which, if absent, prevents application of section 1(18). The above quoted holding makes it clear that the expenditure of carrier funds was held to be essential. The court characterized carrier expenditure as a crucial consideration (Pet. App. 17).

Respondent states that it does not operate a line of railroad within the scope of the statutory language of section 1(18) (Resp. Brief, p. 6), and that petitioner does not come to grips with the language of the statute (*Id.* p. 7). The broad sweep of the statutory language

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[1] " * * * Peabody Coal Company, at the time of the trial owned the entire 10.5 miles of track from its Lynnville Mine to a connection with Southern. Southern operates over that track solely to serve the Lynnville Mine as part of its common carrier transportation of coal on its published tariff rates to both interstate and intrastate destinations." (Pet., p. 5).

(Pet. App. 31) includes operation by a railroad over tracks which it does not own. In *Transit Comm.* v. *United States,* 289 U.S. 121 (1933), this Court held that:

> " * * The phrase 'to operate any line of railroad' seems sufficient to include such use. There is nothing to suggest that the 'operation' for which the commission's approval is required may not be by other than the owner or lessee of the line or that it is to be limited to exclusive use." (289 U.S. at p. 128).

In the *Transit* case, this Court held that the Interstate Commerce Commission had exclusive jurisdiction under section 1(18) to prescribe the terms of a trackage agreement including the rental for the use of the track. In construing the statute there this Court looked to its purpose, stating that the Act, including section 1(18), is to be "construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." (289 U.S. at p. 128).

In *Texas & Pacific Ry.* v. *Gulf, Colo. & S. F. Ry., supra,* this Court stated the dual purpose of section 1(18) as (1) the prevention of waste of rail resources caused by the building of unnecessary lines of railroad, and (2) the preservation of earning capacity of individual carriers. Referring to the second aspect of the statute that opinion holds "that competition between carriers may result in harm to the public as well as in benefit" (270 U.S. at 277). The *Transit* case holds that the statute requires achievement of the first purpose of section 1(18) in situations where the railroad operations were not over its own track. Contrary to respondent's contention the statute includes railroad operation over a shipper's tracks and requires realization of the second and equally important purpose of section 1(18) as stated in the *Texas and Pacific* case.

Respondent argues that this case is controlled by the decision of this Court in *Cleveland, C. C. & St. L. Ry.* v. *United States,* 275 U.S. 404 (1928), discussed at pages 11-13 of the petition. The district court, while treating that case as persuasive, noted that it was not in point (Pet., App. 10). The *Cleveland* case was a suit to set aside an order of the Interstate Commerce Commission under a different section of the Act and is not precedent on the question presented here.

Respondent cites *United States* v. *Aberdeen & R. RR.,* 289 I.C.C. 49, 65 (1953), aff'd. sub nom., *United States* v. *I. C. C.,* 352 U.S. 158 (1956); *Rex Jellico Coal Co.* v. *Louisville & N. R.R.,* 237 I.C.C. 67, 70-71 (1940); *Winnsboro Granite Corp.* v. *Southern Ry.,* 176 I.C.C. 481, 483 (1931), in arguing that common carriers are free to operate over private or plant facility tracks (Resp. Brief, pp. 7-8). There was no issue under, or discussion of section 1(18) in those cases. Petitioner does not contend that common carrier railroads cannot operate over private or plant facility tracks. Indeed that is frequently done. Respondent concedes that such operations are subject to the prohibition against discrimination and prejudice contained in Section 3(1) of the Act. (*Id.* at 8) Such operations are also subject to Section 6. *United States* v. *U. S. Smelting,* 339 U.S. 186 (1950). Petitioner submits that a common carrier's operation of trains over a shipper's track also is subject to the requirements of section 1(18). The *Aberdeen, Rex Jellico,* and *Winnsboro* cases, *supra,* do not bear on that question.

Respectfully submitted,

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